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BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH Respondent/Intervenors.	**RESPONDENT ALTON COAL DEVELOPMENT, LLC'S OPPOSITION TO PETITIONERS' MOTION IN LIMINE** Docket No. 2009-019 Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Mine Permit No. C/025/0005 through its attorneys hereby submits this memorandum in opposition to the motion

in limine submitted by petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, "**Petitioners**"), filed with the Board of Oil, Gas and Mining ("**Board**") on April 19, 2010.

INTRODUCTION

Petitioners have moved that the Board prohibit the Division of Oil, Gas and Mining (the "**Division**"), Alton, and/or Kane County, Utah ("**Kane County**") from "introducing or attempting to introduce evidence to contradict, conflict with, or augment the Division's testimony in its Rule 30(b)(6) deposition establishing" certain facts, which are specifically enumerated in its Memorandum in Support ("**Restricted Facts**").[1] Petitioners' Motion must fail because it is contrary to applicable law and seeks to impose additional standards on the Board over and above those established pursuant to Utah's statutory and regulatory requirements.

ARGUMENT

Petitioners' Motion in Limine is entirely without merit and should be rejected. The Petitioners concede that they cannot cite to any Utah case law to support their creative proposition that statements made in a Rule 30(b)(6) deposition by one party somehow preclude not only the deponent, but also *any other party* from introducing any evidence which "contradicts, conflicts with, or augments" that statement. (Petitioner's Mem. in Sup. at p. 2) Petitioners instead rely almost entirely upon one case, Rainey v. American Forest & Paper Assn., Inc., 26 F. Supp. 2d 82 (D.D.C. 1998).

[1] Alton disputes Petitioners' characterization of the Division's testimony in its Rule 30(b)(6) deposition. The Division's 30(b)(6) representative later made corrective statements to his deposition testimony in accordance with Rule 30(e) of the Utah Rules of Civil Procedure, which are not reflected by Petitioners' characterization.

As Petitioners have conceded, Rainey is not controlling upon this Board and there is authority to the contrary. (Pet. Mem. in Sup. at 4-5.) They correctly cite to A.I. Credit Corp. v. Legion Ins. Co., which expressly disagreed with the reasoning of Rainey. 265 F.3d 630, 637 (7th Cir. 2001) (observing that nothing in the advisory committee notes indicates that Rule 30(b)(6) absolutely binds a corporate party to its designee's recollection). But the Seventh Circuit Court of Appeals is not the only court to disagree with Rainey. In Whitesell Corp. v. Whirlpool Corp., the court held that "although the testimony of a 30(b) (6) designee may be binding on the corporation, the Court does not agree that 30(b)(6) testimony precludes the introduction all other evidence that relates to the designee's testimony, inconsistent or not." 2009 WL 3672751, *1 (W.D.Mich. 2009). The Whitesell court went on to specifically address Rainey, stating that it believed it had cited (and adopted) the better-reasoned case law, stating that "the fact that a corporation is bound by the testimony of its designee does not also compel the conclusion that no contradictory evidence is permissible."[2] Id.

However, even if the Board were to adopt the reasoning of Rainey, such adoption would still not support the broad exclusion sought by the Petitioners. As the District Court for the Northern District of California has explained:

> Rainey does not suggest that an inadequate Rule 30(b)(6) deposition may categorically preclude a party from bringing any evidence—indeed, the Rainey court found only that a single, specific affidavit was inappropriate, and discussed a variety of other types of evidence that Defendants offered to support their

[2] Whitesell cites to U.S. v. Taylor, which held that 30(b)(6) a designee statements "is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered." 166 F.R.D. 356, 362 n. 6 (M.D.N.C.1996). It also cites to Pedroza v. Lomas Auto Mall, Inc., 2009 U.S. Dist. LEXIS 46552, at *23-25 (D.N.M April 6, 2009) ("Nothing in rule 30(b)(6)'s language ... indicates that, aside from officially speaking for the organization, the representative's testimony is somehow treated differently than others' testimony. Any fact witness may say one thing at a deposition and another at trial.")).

affirmative defense without suggesting that they were precluded by the inadequate deposition.

Beauperthuy v. 24 Hour Fitness USA, Inc., 2009 WL 3809815, *5 (N.D. Cal. 2009). Thus, Rainey does not support the exclusion of all evidence presented by the Division related to the Restricted Facts; rather, it only supports the exclusion of specific statements. For instance, in this case, Petitioners are attempting to prohibit the introduction of evidence establishing the applicable water quality standard for total dissolved solids. (Pet. Memo in Sup. at 2, ¶ 1.) Even under the rule in Rainey, it would be inappropriate to exclude evidence of State water quality standards which are not established by Mr. Smith or the Division.

Finally, even if this Board were to adopt Rainey as its standard and accept Petitioners' characterization of its applicability here, Petitioners cite to no authority whatsoever supporting their assertion that Rainey somehow extends to parties other than the deponent. Petitioners cannot provide any authority to justify depriving Alton of its rights to adduce and present evidence at the hearing. Nor does such a broad limitation on introduction of evidence have any basis in logic. If such a principle were to govern, a party could be precluded from presenting evidence just because such evidence is contrary to statements made by a different party in a 30(b)(6) deposition. Parties to litigation could then use a 30(b)(6) deposition as a "shield" against evidence from other parties to the litigation. Such a radical misuse of Rule 32 cannot be allowed to hold sway with this Board.

The use of evidence in formal administrative hearings in Utah is governed by the Utah Administrative Procedures Act ("UAPA"). The general rule is that hearings are to be conducted "to obtain full disclosure of relevant facts and afford al parties the opportunity to present their positions." Utah Code § 63G-4-206(1)(a) (LexisNexis 2009). To that end, a presiding officer "shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence." § 63G-4-206(1)(d). The Board must exclude

privileged evidence, and may, in its discretion, exclude evidence that is irrelevant, immaterial, or unduly repetitious[.]" § 63G-4-206(1)(b)(i). Admissibility of evidence is therefore, except for privileged material, entirely within the Board's discretion. In this matter, the mandate to obtain full disclosure of relevant facts weighs heavily in favor of allowing Mr. Smith's testimony, without restriction, in case there are qualifications, limitations, or nuances that escaped counsel's questioning at deposition.

In addition to UAPA's broad mandate for including evidence, the statute specifically applicable to this permit review hearing mandates that a party's rights at the hearing include "the right to examine any evidence presented to the Board; [and] the right to cross-examine any witness." § 40-10-6.7(2)(b)(i)–(ii). Because a deposition is not a full evidentiary hearing, these rights cannot be assumed to have been afforded to either the Division or Alton by their presence and opportunity to question Mr. Smith at his deposition. Even if Petitioners were correct that a "right" exists to avoid being "sandbagged" by a possible shift in Mr. Smith's answers to certain questions, the right can be fully vindicated through the same right Alton demands for itself: the right to examine the evidence, and cross-examine the witness. On balance, in light of the statutory expression of these due process rights, more rights will be denied than will be preserved by granting the Motion in Limine. The Board should hear Mr. Smith's testimony, including cross-examination by Alton and Petitioners, without restrictions based on the purported rights afforded by the 30(b)(6) deposition format.

CONCLUSION AND REQUESTED RELIEF

Based upon the foregoing, the Board should deny Petitioners' Motion in Limine. Alton should be permitted to present, via exhibits or testimony, any relevant evidence regarding the issues addressed in Mr. Smith's deposition. In addition, Mr. Smith should be permitted to testify regarding his answers to the questions posed by Sierra Club's counsel in deposition, including

either contradictory or explanatory answers. Finally, the Division should be permitted to present whatever evidence is relevant to the questions posed in deposition.

Respectfully submitted this 26th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via email and U.S. Mail, postage prepaid, this 26th day of April, 2010, to the following:

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